In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 849

CARL PICCIOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 352 F. 2d 856.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petition for rehearing was denied on November 26, 1965. The petition for a writ of certiorari was filed on December 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, its holding in *United States* v. *Kahriger*, 345

208-146—66

U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, that the registration requirement of 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.

2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.

3. Whether petitioner is entitled to a new trial because of pretrial publicity generated by his arrest.

4. Whether the evidence was sufficient to support the jury's finding that petitioner's violations of 26 U.S.C. 4411 and 4412 were willful.

5. Whether, after a government witness testified without objection that petitioner had refused, on the advice of counsel, to answer questions when he was arrested, the trial judge committed reversible error by clarifying this testimony and by subsequently refusing to give a particular cautionary instruction in his charge.

STATEMENT

Petitioner was convicted on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $5,000 on the first count, and received a suspended sentence and probation for two years on the second count.

ARGUMENT

1. Petitioner was one of approximately forty-five individuals arrested on October 8, 1964, in connection with violations of the wagering tax statute in the Bridgeport, Connecticut, area. His contentions here in regard to the asserted unconstitutionality of the statute when measured against the Fifth and Tenth Amendments are the same as those raised in the petitions filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.), and are treated in our combined brief in answer to those petitions. See also *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838. Our answer in that brief to the contention in regard to prejudicial pretrial publicity also applies here. Indeed, unlike the petitioners in Nos. 823, 826, and 1028 Misc., petitioner here was not personally named in the press release announcing the arrests. In addition, like the petitioners in Nos. 826 and 1028 Misc., petitioner here affirmatively requested trial in Bridgeport, where the arrests had taken place and publicity had been the most intense (Pet. App. 2a).[1]

[1] Petitioner also complains of the denial of his pretrial motion for a new jury panel or a continuance because of publicity arising out of testimony given during the prior trial of Marchetti, Costello and Gjanci, in which petitioner's name was prominently mentioned (Pet. 27–28). However, inquiry by the trial judge of the jurors who tried petitioner revealed that none of them had read or heard about him or the prior case (Pet. App. 3a).

2. Petitioner was the co-proprietor of a bar and restaurant in downtown Bridgeport. An agent of the Internal Revenue Service, acting in an undercover capacity, made arrangements with Arthur Gjanci (the petitioner in No. 1028 Misc.) whereby the agent could place wagers by telephone with petitioner. The agent was instructed by Gjanci that in doing so he should say "This is Bill for Artie" (Pet. App. 2a). When the agent first called petitioner, the latter hesitated on the telephone; when he finally accepted the wager he told the agent that he had to get to know his voice (R. 71; G. App. 8a).[2] After placing a large number of wagers by telephone, the agent was introduced by Gjanci to petitioner, who requested that more "action" be sent to him and who stated that he intended opening another place to expand his gambling operation (R. 64, 67, 124–125).

Thereafter, the agent placed wagers with petitioner at his bar. In accepting them, petitioner would look up and down the bar to make certain that he was not being observed (R. 52, 97, 122, 123, 149; G. App. 8a–10a), and on one occasion he paid the agent his winnings by passing him the money "in a secretive manner with his hand clasped" (R. 122; G. App. 10a). When petitioner was arrested, he had in his pockets $495.15 in cash and checks and

[2] "R." indicates the trial transcript contained on the record on appeal in the court of appeals; "G. App." indicates the government's appendix in the court of appeals.

three issues of a horse racing publication used by bookmakers (R. 216, 220). Nine other publications used by bookmakers were found on the premises (R. 233). During the hour after petitioner's arrest, one of the officers engaged in a search of petitioner's bar received 23 telephone calls from persons seeking to place wagers or to ascertain betting odds (Pet. App. 2a). Petitioner took the stand in his own defense and testified that he placed wagers himself but was not in the business of accepting them from others, and that as a favor he had placed the agent's wagers with his own bookmaker (R. 602; G. App. 6a).

The evidence thus abundantly established that petitioner, in a proprietary capacity, engaged in the business of receiving wagers on a large-scale and on a regular (rather than casual or intermittent) basis, that he carried on this business in association with others similarly engaged, and that he made efforts at concealing his operations. Since he offered no evidence that he lacked knowledge of the requirements of registering and obtaining a tax stamp, but based his defense instead upon the contention that he was not in the business of accepting wagers, the jury could properly infer that his failure to register and purchase the stamp was willful. *Ingram* v. *United States*, 360 U.S. 672, 677; *Edwards* v. *United States*, 334 F. 2d 360, 365–368 (C.A. 5), certiorari denied, 379 U.S. 1000; *United States* v. *Russo*, 335 F. 2d 299, 300–301 (C.A. 7), certiorari denied, 379 U.S. 962; *United States* v. *Marquez*, 332 F. 2d 162, 164–166 (C.A. 2), certiorari denied, 379

U.S. 890; *Evans* v. *United States*, 349 F. 2d 653, 657 (C.A. 5).

3. During the trial, a government agent testified, without objection, that petitioner's counsel, who had been present when petitioner was arrested, had instructed him not to answer any questions, but did, after examining the agent's questionnaire sheet, permit personal history questions thereon to be answered (R. 250–251; G. App. 11a). When the agent finished his testimony, the trial judge, in order "to get it clear in my mind * * * as to precisely what happened" (R. 276; G. App. 13a), inquired whether this meant that petitioner was instructed "not to answer any questions with respect to whether or not he was accepting horse wagers on the premises," and was informed that it did (R. 274–275; G. App. 12a). At this point counsel objected, saying, "I think the jury has got an implication that there is no constitutional right here involved. He had a constitutional right not to answer" (*ibid.*). The judge thereupon informed the jury that petitioner had acted within his constitutional rights, and asked whether counsel wished to inquire further of the witness. Counsel replied, "I just wanted the record to note my objection to all your statements and answers thereto. They were extremely prejudicial" (R. 276–277; G. App. 13a–14a). Counsel did not, at that point, request any cautionary instruction in regard to the

exchange. When the case was submitted to the jury, however, he requested an instruction that the fact that petitioner had exercised his constitutional rights was not to be considered in any way or referred to by the jury during its deliberations (Pet. 19). This instruction was not given; instead the judge, in the process of summing up the evidence, recounted the fact that petitioner, under his counsel's instructions, had answered only the personal history questions, and instructed that both he and counsel had acted within their rights (R. 594; G. App. 4a–5a).

As the court of appeals noted (Pet. App. 6a), the information elicited by the judge's inquiry added nothing of significance to the testimony which the agent had previously given without objection. In addition, the judge's question focused only upon petitioner's refusal to answer whether he was accepting wagers, an element of the offense which was amply established by testimony and other direct evidence. There was no suggestion on the part of either the judge or the government that the jury should make affirmative use of petitioner's reliance upon his right not to answer in inferring either guilt or willfulness or to question petitioner's credibility. Compare *Stewart* v. *United States*, 366 U.S. 1; *Grunewald* v. *United States*, 353 U.S. 391, 415–424; *Fâgundes* v. *United States*, 340 F. 2d 673, 677 (C.A. 1). Moreover, the only objection made at the time of the incident was that the judge's inquiry carried the implica-

tion that petitioner had no constitutional right not to answer the agent's questions. The judge immediately informed the jury that petitioner had acted fully within his rights and no further cautionary instruction was requested at that time. In these circumstances, the judge's failure to tell the jury in his final instructions that it should ignore his earlier inquiry and the response thereto can not be deemed to have had a prejudicial effect upon the outcome of the trial requiring reversal of the verdict.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1966.

[3] Petitioner complains because the trial judge reviewed the incident again in his summary of the evidence (Pet. 19). The review, however, was necessitated by the request for an instruction concerning the incident.

U.S. GOVERNMENT PRINTING OFFICE:1966